



## WORKPLACE 'FUTUREPROOFING' LEGAL ISSUE SPOTTING

*This issue-spotting roadmap is designed to aid with identifying potential legal and practical issues associated with the implementation of new approaches to futureproofing an organization, particularly focused on new technology in the workplace. This list is not comprehensive, nor is it designed to replace the need for legal advice and counsel. Any time an organization is considering the use of new technology that has an impact on the workplace or terms and conditions of employment, consultation with legal counsel is strongly advised.*

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### I. Business issues

- a. Who in the organization is setting futureproofing strategies?
- b. Who and how is the organizing defining success for new futureproofing strategies?
- c. How is the organization assessing results versus success benchmarks?
- d. How regularly is the organization assessing success of new strategies?
- e. If the organization is not prepared to implement strategies internally. How is the organization assessing partners?
- f. How will the organization ensure any technology functions as promised?
- g. Who is the "team" vetting the strategies? (Should be a combination of legal, HR, workplace health/safety, operations, and IT)
- h. Does the organization's subject matter experts understand technology used?
  - i. Examples of questions that need to be understood:
    1. What data is being collected?
    2. How long is it being stored?
    3. Where is it being stored?
    4. Who has access to data being collected? Does the developer continue to have access?
    5. If the developer has access, what is the developer using the data for?
    6. Will the data be anonymized?



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### 7. Whose device will be used (personal or employer-provided)?

- i. What contractual language regarding data privacy/security and indemnification is in an agreement with a developer/vendor relating to new technology?
- j. Has the organization provided training to all employees using new technology so that they understand how to use it, why the organization is implementing the technology, and what the organization's expectations for the technology and employee use are?
- k. Does new technology create the risk of content-based claims or issues? For example, are employees permitted to post social content through the technology? If so, what does the organization have in place to mitigate disputes relating to harassment, bullying, or employee privacy issues?

## II. Labor issues

- a. Does the organization have unionized employees?
- b. Does new technology, programs, or strategies alter employees' terms and conditions of employment?
- c. Is there a technological change provision or other provision of a CBA that may either require or eliminate the need to bargain over the changes/new strategies, including new technology?
- d. Even if no labor union:
  - i. Could the new strategy or technology impinge on protected concerted activities?
  - ii. Could the new strategy or technology lead to allegations of surveillance?



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- iii. Could the new strategy or technology lead to employee dissatisfaction and a risk of union organizing? If so, what is the plan to counteract?

### III. Data privacy and cybersecurity issues

- a. Does the new strategy or technology potentially intrude on employees' privacy (either common law privacy rights or statutory privacy rights)?
  - i. If so, has the organization complied with all necessary notification, consent, destruction, and/or other requirements or best practices?
- b. Does any technology record speech or video?
  - i. Does the organization have an obligation to give notice or consent before making such recordings based on the jurisdiction(s) in which the organization operates?
- c. Does new technology gather biometric information?
  - i. If so, does the organization operate in a jurisdiction that has a biometric privacy act? If yes, has the organization complied with all statutory requirements?
- d. Does new technology use artificial intelligence in video interviews? If so, has the organization evaluated whether the jurisdiction(s) in which it operates have/has a relevant law regulating the use of AI in employment (like Illinois and Maryland) and what steps are necessary to comply?
- e. Does new technology collect, store, and/or transmit information subject to a relevant jurisdiction's data breach laws? If so, is the organization prepared to comply?
- f. Is the organization collecting the right information connected with or through new strategies including new technology? For example:



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- i. Is the organization collecting more information than it has a business need to collect?
  - ii. Does the organization need to preserve information related to or collected by the technology for discovery or recordkeeping obligations?
  - iii. If the technology is collecting data, how is it being stored? Does the organization have a plan to ensure compliance with all applicable laws; for example, if health information is being collected, an employer must ensure compliance with the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act of 2008, and any additional relevant state and international laws.
  - iv. For how long is the organization storing information connected to the technology? How long should it be?
  - v. Who has access to the information connected with the technology? How is the organization minimizing access and distribution?
- g. Has the organization established reasonable systems to prevent the unauthorized access to personal data and to regularly audit the systems once in place?

### IV. Workplace health and safety issues

- a. Does new technology change the physical working environment? If so, has the organization evaluated whether it is in compliance with any applicable federal or state occupational safety obligations?
- b. Has the organization evaluated any potential physical or mental impacts of new technology? (For example, virtual reality technology may cause dizziness or nausea)



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### V. Bias and Discrimination issues

- a. Could the futureproofing strategy have a disparate impact on certain workers?
  - i. How is the organization selecting employees to participate in any new strategies or programs?
  - ii. How will the organization address employees who do not wish to participate?
  - iii. How will the organization address employees who do not successfully complete new programs (e.g., retraining)?
  - iv. How will the organization address requests for accommodation relating to new programs or strategies?
  - v. With respect to technology, has the organization considered whether the technology could have been developed with data sets that contain implicit racial, gender, or ideological biases making the technology solution unreliable?
  - vi. Has the organization worked to understand an algorithm used in any artificial intelligence-powered software as well as what training data was used?
  - vii. Has the organization requested and reviewed any validation studies of software?
  - viii. Does the organization have a plan in place to audit the technology?
  - ix. Does the organization have a plan in place to assess and eliminate any disparate impact that may develop after the implementation of new strategies or tools?



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- b. Do all employees have the phones/tools to participate in new strategies, including technologies? How will the organization handle employees without the tools to access the technology (e.g., without a mobile device)?
- c. How will the organization handle employees who cannot use technology or otherwise request an accommodation?
  - i. Has the organization explored different technology that may minimize the need for accommodations? (For example, if the organization is purchasing voice-activated technology (VATs), has the organization considered VATs that has visual cues such as display screens that would allow those with speech impairments to fully use the tech)

### VI. Wage and Hour Issues

- a. Is any new technology housed on a personal device (for example, through an app)? If so, does the organization's relevant jurisdiction(s) require the reimbursement of expenses for a portion of the cost of cellular data and/or home internet plans?
- b. Is the employee able to use the technology outside of ordinary work hours? Are users non-exempt employees? If so, how will the organization avoid claims for off-the-clock hours?
- c. Similarly, can employees use the technology during meal or rest periods? If non-exempt employees can use the technology during required breaks, has the organization directed non-exempt employees to use the technology only during working hours and developed a strategy to audit to ensure this is occurring as directed?
- d. Has the organization considered a strategy to conduct a post-rollout audit and survey to determine if the technology is being used as expected?



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### VII. Miscellaneous Issues

- a. Is new technology geo-fenced? E.g., does it collect information about employees outside the workplace? If it does, has the organization considered off-duty access laws in relevant jurisdictions?
- b. Is new technology collecting GPS data? If so, has the organization considered relevant state laws regarding collection of GPS data?

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